Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-283

FREDERICK BITZER, et al.,

Petitioners,

v.

DONALD MATTHEWS, et al.,

Respondents.

BRIEF FOR RESPONDENTS REGARDING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Paul W. Orth
Austin Carey, Jr.
266 Pearl Street
Hartford, Connecticut 06103

Edward Gallant
760 Capitol Avenue
Hartford, Connecticut 06106

Counsel for Respondents

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Opinions Below

The opinion of the Court of Appeals for the Second Circuit (pg. 26a of Appendix to Petition) is reported at 519 F.2d 559. The opinion of the District Court for the District of Connecticut (pg. 2a of Appendix to Petition) is reported at 390 F. Supp. 278.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Counterstatement of Question Presented

Whether, if private individuals prevail against state officials in a suit under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. Sec. 2000e *et seq.*, the Eleventh Amendment bars an award to those plaintiffs of reasonable attorneys' fees as a part of the costs.

Constitutional and Statutory Provisions Involved

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Reference is also made to those portions of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. Sec. 2000e *et seq.*, set

forth in respondents' own petition for Writ of Certiorari in No. 75-251. In particular, 42 U.S.C. 2000e-5(k) provides in pertinent part that:

> "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs..."

Statement of the Case

The case is adequately stated in the petition, except that it should be noted that the respondents have also petitioned the Court for a Writ of Certiorari to review the judgment and opinion of the Second Circuit to the extent that it held that in a suit by private individuals against state officials, the award of backpay expressly authorized by Congress in the Equal Employment Opportunity Act of 1972 (amending Title VII of the Civil Rights Act of 1964) is barred by the Eleventh Amendment. *Fitzpatrick v. Bitzer,* No. 75-251. That question is closely related to the question here presented, and both, in our view, present important federal questions which should be decided by this Court.

Argument

The petitioners herein have submitted as their sole reason for the granting of their petition a purported conflict between the decision of the Second Circuit below and decisions of the Third, Fifth and Sixth Circuits in *Jordon v. Gilligan,* 500 F.2d 701 (6th Cir. 1974); *Taylor v. Perini,* 503 F.2d 899 (6th Cir. 1974); *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Dept.,* 496 F.2d 1017 (5th Cir. 1974); and *Skehan v. Trustees of Bloomsburg State College,* 501 F.2d 31 (3d Cir. 1974). At least from a technical standpoint, however, a conflict does not exist.

In each of the four cases cited by the petitioners, it was indeed held that an award of attorneys' fees against state officials was barred by the Eleventh Amendment. This rationale clearly conflicts with the reasoning of the Second Circuit in its decision below. See *Alyeska Pipeline Service Co. v. The Wilderness Society,* 421 U.S. 240, 269 n.44 (1975). However, in none of those four cases was the claim for attorneys' fees based upon express statutory authority, as is the situation here. It is then not certain, although highly probable, that at least the Third and Sixth Circuits would follow that rationale when confronted with a federal statute, such as 42 U.S.C. 2000e-5(k), which expressly authorizes that which in their view the Eleventh Amendment prohibits.

Also, the present viability of each of these four decisions is questionable. *Jordon v. Gilligan, supra,* conflicted with a contemporaneous decision of another panel of the Sixth Circuit in *Milburn v. Huecker,* 500 F.2d 1279 (6th Cir. 1974). This conflict was resolved in *Taylor v. Perini, supra,* which then became "the ultimate position of [the Sixth] Circuit", 503 F.2d at 912 (dissent). On May 27, 1975, *Taylor v. Perini* was vacated and remanded for reconsideration in light of *Alyeska Pipeline Service Co. v. The Wilderness Society, supra,* 421 U.S. 982. On the same date *Skehan v. Board of Trustees of Bloomsburg State College, supra,* was also vacated and remanded with a similar instruction for reconsideration. 421 U.S. 983. Since both cases appear to be controlled by *Alyeska,* further consideration of the Eleventh Amendment issue in *Taylor* and *Skehan* has probably been obviated. Although a petition for Writ of Certiorari was denied in *Gilligan v. Jordon,* 421 U.S. 991 (1975), that decision, as was noted above, was not the "ultimate position" of the Sixth Circuit on the Eleventh Amendment issue.

The decision of the Fifth Circuit cited by the petitioners, *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Dept., supra,* was in

direct conflict with a decision of another panel in that Circuit. *Gates v. Collier,* 489 F.2d 298 (5th Cir. 1973). In order to resolve this conflict, a consolidated hearing, *en banc,* was ordered for *Gates, Named Individual Members of the San Antonio Conservation Society,* and a third case, *Neuman v. State of Alabama,* 503 F.2d 1320, at 1321 n.1. Upon rehearing, the Fifth Circuit, *en banc,* over strong dissents, vacated and remanded *Gates* and *Neuman* for reconsideration in light of the supervening decisions in *Alyeska Pipeline Service Co. v. The Wilderness Society, supra,* and *Edelman v. Jordan,* 415 U.S. 651 (1974). *Gates v. Collier,* __F.2d__, No. 73-1790 (5th Cir. *en banc,* dec. 10/29/75); *Neuman v. State of Alabama,*___F.2d__, No. 73-2033 (5th Cir. *en banc,* dec. 10/29/75). The denial of attorneys' fees in *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Dept.* was affirmed on the basis of *Alyeska.*__F.2d__, No. 74-1231 (5th Cir. *en banc,* dec. 9/25/75). (This Court had denied certiorari. 420 U.S. 926 (1975))

Although there may be no conflict in a narrow sense, however, respondents cannot conclude that the Third and Sixth Circuits would deviate in any material respects from their conclusions in *Skehan* and *Taylor.* They would rely mainly on the Second Circuit's decision regarding backpay in order to bar recovery of both backpay *and* attorneys' fees from state treasuries. That there is a conflict in the underlying reasoning of the several circuits on the meaning of *Edelman v. Jordan, supra,* cannot be questioned. See further, *Thonen v. Jenkins,* 517 F.2d 3, 7 (4th Cir. 1975); Note, "Attorneys' Fees and the Eleventh Amendment," 88 Harv. L.Rev. 1875, 1876, 1889 (June 1975).

As the Memorandum for the United States as Amicus Curiae indicates, resolution of the question regarding awards of attorneys' fees raised herein and of the closely related question regarding awards of backpay raised in respondents' petition for writ of certiorari, No. 75-251, is of great importance to the enforcement of Title VII of the Civil

Rights Act of 1964 in the public sector. So long as the ultimate resolution of these issues remains in doubt, the enforcement of Title VII by private individuals in suits against state officials will be significantly impaired and the limited resources of the Attorney General of the United States severely taxed. Currently there are substantial differences in rationale, not only among the several circuits, but until recently even among panels within at least two of the circuits. There also is a considerable question about the precedential significance of this Court's summary affirmance in *Amos v. Sims,* 409 U.S. 942 (1972) of 340 F. Supp. 691 (M.D. Ala.). Compare *Jordon v. Gilligan, supra,* 500 F.2d at 708-9 and *Skehan v. Trustees of Bloomsburg State College, supra,* 501 F.2d 42 at n.7 with *Boston Chapter N.A.A.C.P., Inc. v. Beecher,* 504 F.2d 1017, at 1029 (1st Cir. 1974) *cert. denied,* 421 U.S. 910 (1975) and *Gates v. Collier, supra,* 489 F.2d at 302. See also *Alyeska Pipeline Service Co. v. The Wilderness Society, supra,* 421 U.S. at 270, n.46.

This petition, like the one in No. 75-251, presents an important question of federal law which has not been, but should be, decided by this Court. As in No. 75-251, the meaning of prior decisions of this Court and the tension between the Eleventh and Fourteenth Amendments and enabling legislation under the latter is involved. To defer final resolution of either or both of these important questions would seriously retard the mechanism which Congress intended to be the primary means of enforcing the application of Title VII to state governments – the suit by private plaintiffs against state officials. A decision supporting the backpay and attorneys' fees relief against state officials and governments enacted by Congress in the Equal Employment Opportunity Act of 1972 pursuant to its authority under Section 5 of the Fourteenth Amendment, would of course remove that impediment to the Congressional purposes. If either or both of the remedies so established is barred by the Eleventh Amendment, the earliest possible decision to that effect also serves substantial and salutary purposes by allowing Congress promptly to

reconsider and revise the enforcement mechanism of Title VII, whether by increasing the Attorney General's staff and resources or otherwise.

CONCLUSION

For the above reasons, the respondents do not oppose the Petition for a Writ of Certiorari.

Respectfully submitted

Paul W. Orth
Austin Carey, Jr.
Edward Gallant

Counsel for Respondents